BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

REDACTED DECISION – DK# 15-103 RP-M

BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON SEPTEMBER 23, 2015
ISSUED ON MARCH 23, 2016

SYNOPSIS

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW
HEARING PROCEDURES

In a hearing before this Tribunal, it is well settled that the taxpayer has the burden of proof. *See* W.Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W.Va.154, 544 S.E.2d 79 (2001).

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW
PERSONAL INCOME TAX

This Tribunal finds that the governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's accounts or returns. *See* W.Va. Code §11-10-7; W.Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59.

WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW
WEST VIRGINIA SUPREME COURT OF APPEALS

As set forth by the West Virginia Supreme Court of Appeals, when considering equitable principles in the circumstance presented before it but equally applicable to the case at hand in the opinion of this Tribunal, Petitioner's arguments here, while having equitable force, must be considered in light of "two basic considerations [that] mitigate against giving them dispositive weight in the instant case." *Helton v. Reed,* 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006). Specifically, the first consideration is the principle that filing requirements

established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering." *Helton v. Reed*, 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006) (internal citations and quotations omitted).

CONCLUSION OF LAW
WEST VIRGINIA SUPREME COURT OF APPEALS

The *Reed* Court went on to explain that "[t]he second consideration is the application in the instant case of two classic (and closely related principles: the maxim "equity will not enforce a forfeiture" and the maxim "he who seeks equity must do equity." The Court goes on to explain that that "'[f]orfeiture' is defined by *Black's Law Dictionary*, Sixth Edition, as 'the loss of . . . property because of neglect of duty.' 'To forfeit is to incur loss through some fault, omission, error or offense'". *Helton v. Reed*, 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006). By way of reference, the *Helton* Court references those certain series of cases commonly known as "*U.S. Steel I*", whereby the OTA denied the Respondent's request to hold a decision in abeyance pending the final results of *US Steel. Id* at 162, 559. The *Helton* Court goes on to explain that with respect to this second equitable principle, "he who seeks equity must do equity." *Id.* (internal citations and quotations omitted).

FINAL DECISION

On March 27, 2015, Petitioner timely filed her petition for reassessment (the "Petition") with this Tribunal, the West Virginia Office of Tax Appeals (the "OTA"). The Petition was filed in response to that personal income tax assessment, issued on February 20, 2015 and made against Petitioner in the amount of $_____ for the tax period ended December 31, 2013 (the "Assessment"). Inasmuch as the course of events leading up to the Assessment is rather convoluted, the OTA has set forth, by way of findings of fact derived from the testimony in the evidentiary hearing, the exhibits which were properly introduced and admitted into evidence in this matter, and any and all other documents constituting the record in this matter. On September 23, 2015, this Tribunal held an evidentiary hearing (the "Hearing") regarding Petitioners' Petition. The Hearing was held in Martinsburg, West Virginia, pursuant to Petitioners' selection

of OTA's mobile docket procedures. This matter was heard in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. The Petitioner, a married individual with a filing status for Federal and State income tax purposes, is a resident of Martinsburg, Berkeley County, West Virginia, and appeared *pro se* in the instant matter.

2. Timothy S. Waggoner represents the State Tax Commissioner of West Virginia (the "Respondent").

3. By postmark dated April 15, 2015, as notated on State's Exhibit 1, the Petitioner filed her 2013 personal income tax return, with a filing status of married filing separately, showing tax due of $_____ (the "2013 Return").

4. The testimony is uncontroverted that although Petitioner timely filed the 2013 Return, she failed to pay the amount due and owing to the State of West Virginia as required by Chapter 11 of the West Virginia Code.

5. According to State's Exhibit Number 4, Petitioner's husband drafted a check from his personal checking account in the amount of $842.00 (the "Spouse's Check").

6. The Spouse's Check was made payable to the Order of the West Virginia State Tax Department, as payee, and bearing the signature purporting to be that of the Petitioner's spouse[1], as payer for his own personal checking account.

7. The "memo line" of the Spouse's Check includes both the social security number of Petitioner's spouse as well as the return type and year for which the Spouse's Check was issued.

8. As set forth in Petitioner's Exhibit Number 1, the Respondent issued to Petitioner a return change letter, dated November 21, 2014 (the "Return Change Letter") and, according to the record in this matter, attributable to Petitioner's individual account, which was assigned account number _____ ("Petitioner's Account Number") by Respondent's GEN TAX computer system ("GEN TAX").

9. The Return Change Letter states that the amount shown on line 10 of the 2013 Return as total taxes due was adjusted, the explanation for which was two-fold, namely, that: 1) "Your direct debit payment cannot be processed due to incorrect bank information. A check should be mailed to the West Virginia State Tax Department"; and 2) 'Taxpayers filing Married Filing Separately must use Rate Schedule 2 in computing the tax. An adjustment has been made."

10. Respondent issued Petitioner a refund check in the amount of $_____, by check dated November 25, 2014, bearing the Petitioner's Account Number (the "Refund Check").

[1] Petitioner's spouse was not a party to the Hearing; neither his name nor any identifying information is recited here due to taxpayer confidentiality. There is, however, no evidence in the record to suggest that the signature was that of anyone other than Petitioner's spouse nor does Respondent make any such allegation.

11. During the Hearing, Petitioner testified that she is currently married to the individual with whom she indicates as her spouse in her 2013 Return, that she has been married to this individual for over twenty (20) years, and that she had the benefit of and did, in fact, avail herself of the amounts that her spouse received by Respondent by virtue of the Refund Check.

12. On December 22, 2014, Respondent issued to Petitioner a "Statement of Account," (hereinafter known as the "December Letter"), which set forth a balance due of $_____, consisting of: a) tax due in the amount of $_____, which is the amount of the Refund Check, b) tax due in the amount of $_____, which is due according to the 2013 Return, c) penalties and additions in the amount of $_____; and d) interest in the amount of $_____.[2]

13. According to the evidence submitted in this matter, the Respondent's "OASIS" software system[3] shows that the Refund Check was transmitted to the Petitioner by means of electronic transfer and cleared the Petitioner's bank account on December 2, 2014.

14. Respondent admitted and offered evidence that it improperly made the Refund Check payable to Petitioner rather than to Petitioner's spouse, offering the explanation that the Spouse's Check failed to identify the individual taxpayer identification number assigned to him by Respondent's own GENTAX system. In other words, Respondent alleges that because Petitioner listed his own social security number in the memorandum line of the Spouse's Check,

[2] The difference between the amount shown in the Assessment and the amount shown in the December Letter is attributable to accrued interest during the period between the Assessment and the December Letter.

[3] The "paid checks" function is but one of many functions that the State of West Virginia uses in the OASIS system.

GENTAX attributed such amount to both Petitioner and her spouse's GENTAX account number, regardless of their status as married filing separately as indicated on Petitioner's 2013 Return.[4]

15. Since the Assessment resulted from Respondent improperly issuing the Refund Check, the Respondent did not include interest and penalties in addition to the tax due pursuant to the Assessment.

16. Petitioner testified that she was entitled to the benefit of the Refund Check and enjoyed the benefits therefrom.

DISCUSSION

The issue in this case is whether Petitioner is required to repay to Respondent a the Refund Check that although improperly issued by the Respondent to the Petitioner rather than to her spouse but to which Petitioner nonetheless received and enjoyed the benefit therefrom. In essence, the Petitioner here is asserting an equitable argument, to wit:, that Respondent should be estopped from collecting amounts due and owing pursuant to the 2013 Return and the Assessment where Respondent improperly issued the Refund Check to Petitioner rather than to her spouse but for which the Petitioner, by her own admission, enjoyed the use and benefits thereof.

[4] This Tribunal does not find persuasive Respondent's assertions concerning the alleged misidentification of his individual GENTAX account, as GENTAX numbers are not shown on the Assessment, the December Letter or any other documentation contained in the record. Nor is there any evidence that either Petitioner or her spouse would have known, or had any reason to know, his or her GENTAX account number. Nevertheless, we have included this information for purposes of setting forth a complete and accurate timeline of events for this Decision.

Because Petitioner is *pro se*, she of course does not advance the term "estoppel," rather stating that the Respondent's actions were unfair. Nevertheless, in order to grant Petitioner the relief requested in her Petition, i.e., that she does not owe the amounts listed in the Assessment because it is unfair since Respondent improperly issued the Refund Check to her spouse in the first instance, the practical effect is that Petitioner asks this Tribunal to estop the Respondent from taking any and all action associated with the Assessment.

In *Helton v. Reed*, 638 S.E.2d 160, 219 W. Va. 557 (2006), the taxpayer argued that Respondent should be estopped from claiming as untimely its petition for refund because: 1) Respondent did not object to the manner in which the petitioner there filed its petition for refund, i.e., that the petitioner filed its petition for refund with Respondent rather than with the OTA, as statutorily required; Respondent did not indicate that such petition would be forwarded to OTA; 3) Respondent "understood" that petitioner's petition to be included in *US Steel II* line of cases[5], a series of cases then before OTA with similar issues to those of the petitioner there, and that those petitions were treated by OTA as timely filed; and 4) that the OTA believed that it was ruling on all of the refund petitions pending at the time, no matter where they had been filed. *Id*.

By way of explanation, in the *U.S. Steel I* cases, of which the taxpayer in *Reed* was a party, the OTA ruled, erroneously as ultimately determined by the West Virginia Supreme Court of Appeals, that the taxes at issue there were unconstitutional and should therefore be refunded. The same issue was at stake in line of cases associated with *US Steel II* involved the same issue but different tax years; however, the taxpayer in *Reed* erroneously filed its petition for refund

[5] In *US Steel II*, the Respondent forfeited nearly $20 million dollars of taxes because the Court found that it did not adhere to a statutory timely filing requirement. *Helton v. Reed*, 638 S.E.2d 160, 164; 219 W. Va. 557, 561, (2006).

with the Respondent rather than with the OTA, as required by statute, resulting in being excluded as a petitioner in *U.S. Steel II* due to untimely filing. The OTA ruled that the and resulting in the *Reed* petitioner being ostensibly excluded as a party in *Reed II* at the OTA level. *Id.* at 162.[6]

In the *U.S. Steel II* cases, the OTA denied the Commissioner's request to hold a decision in abeyance pending the final results of *U.S. Steel I.* The OTA then ruled in *U.S. Steel II* (erroneously, as ultimately determined by this Court in *U.S. Steel I*) that the coal production severance taxes in question were unconstitutional and should be refunded. The OTA's written decision in *U.S. Steel II* did not include a ruling on the *Reed* taxpayer's petition or refer to any docket number associated with Elk Run. The Respondent appealed the OTA's decision in *U.S. Steel II* to the Circuit Court of Kanawha County, and the circuit court affirmed the ruling of the

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[6] The *Reed* procedural history is essential to that taxpayer's equitable argument; however, it is quite convoluted. Because the instant matter is being decided based upon consideration of those same equitable principles, a recitation of that procedural history is instructive and therefore, recited in full below:

> With respect to the taxes at issue in the instant case, by letter dated January 8, 2003, the Commissioner denied Elk Run's request for a refund of severance taxes paid for fiscal year 1999.
>
> After receiving notice of the Commissioner's January 8, 2003 action, pursuant to *W.Va.Code,* 11–10–14(d)(1) [2003] and 11–10A–9(b) [2002], Elk Run had sixty days from the receipt of the Tax Commissioner's letter to file a petition for refund with the newly-created *Office of Tax Appeals* ("OTA"), which acquired jurisdiction over such petitions on January 1, 2003.
>
> On January 24, 2003, Elk Run filed a Petition for Refund—not with the OTA, however, but with the Commissioner. The Commissioner did not forward Elk Run's petition for refund to the OTA, and the OTA did not receive the petition in a timely fashion.
>
> Meanwhile, also in January 2003, a number of other coal companies filed petitions for refund similar to the one filed by Elk Run with the Commissioner, also asserting the unconstitutionality of coal production severance taxes that these companies had paid. These petitions *were* timely received by the OTA, were consolidated for decision by the OTA, and are known collectively as "*U.S. Steel II.*"
>
> In the *U.S. Steel II* cases, the OTA denied the Commissioner's request to hold a decision in abeyance pending the final results of *U.S. Steel I.* On December 11, 2003, the OTA ruled in *U.S. Steel II* (erroneously, as ultimately determined by this Court in *U.S. Steel I*) that the coal production severance taxes in question were unconstitutional and should be refunded. The OTA's written decision in *U.S. Steel II* did not include a ruling on Elk Run's petition or refer to any docket number associated with Elk Run.
>
> The Tax Commissioner appealed the OTA's decision in *U.S. Steel II* to the Circuit Court of Kanawha County. On May 27, 2004, the circuit court affirmed the ruling of the OTA in *U.S. Steel II*—but on procedural grounds, and not on substantive grounds.

OTA in *U.S. Steel II*—but on procedural grounds, and not on substantive grounds.[7]

Acknowledging that the taxpayer's argument in *Reed* "may have some equitable force, two basic consitations militate against giving them dispositive weight in the instant case" Id. Elaborating, the Court explained that "[w]hen considering equitable principles in the circumstance presented before it but equally applicable to the case at hand in the opinion of this Tribunal, Petitioner's arguments here, while having equitable force, must be considered in light of "'two basic considerations [that] mitigate against giving them dispositive weight in the instant case.'" *Id.* Specifically, the first consideration is the principle that filing requirements

[7] For the reader's convenience, a recitation of those procedural grounds is set forth below and quoted directly from *Helton v. Reed*, 638 S.E.2d 160, 162; 219 W. Va. 557, 560 (2006):

> Those procedural grounds were as follows: due to a clerical error, the Tax Commissioner had filed his response to the taxpayers' petitions in *U.S. Steel II* ten days late in the circuit court. The circuit court ruled that the filing deadline in question was jurisdictional, and that the taxpayers in *U.S. Steel II* were therefore entitled to refunds, without regard to the substantive merit of the Commissioner's appeal of the OTA decision. (Again, Elk Run was not included in the circuit court's final order in *U.S. Steel II*.)[3]
>
> On June 16, 2005, the Commissioner filed a petition for appeal of the circuit court's decision in *U.S. Steel II* with this Court. This Court, agreeing that the deadline that the Commissioner had missed by ten days was jurisdictional, refused the petition for appeal on November 3, 2005.
> Meanwhile, at some point Elk Run's counsel realized that Elk Run's petition for refund regarding fiscal year 1999 was not included in the OTA's files, and had not been addressed by the OTA or the circuit court in *U.S. Steel II*.
> In February of 2005, Elk Run filed a motion with the OTA, asking that the OTA rule that Elk Run's Petition for Refund be deemed to have been timely filed with the OTA on January 24, 2003; and the OTA so ruled in an order entered on March 7, 2005. In addition, the OTA ruled that Elk Run's petition for refund should be deemed to have been included, and decided in Elk Run's favor, in the OTA's decision in *U.S. Steel II*.
> In response to the OTA's ruling, the Commissioner filed a petition in the Circuit Court of Kanawha County, challenging the OTA's ruling. By order dated July 12, 2005, the circuit court upheld the OTA's March 7, 2005 ruling, concluding that Elk Run's petition for a refund should be treated as if it had been timely filed with and ruled upon by the OTA, and the circuit court, in Elk Run's favor, in *U.S. Steel II*.
> In other words, Elk Run, under the circuit court's ruling that is at issue in the instant case, would be entitled to the same coal severance tax refunds that the other companies were entitled to receive as a result of the Tax Commissioner's procedural default in *U.S. Steel II*.
> The Commissioner has appealed the circuit court's decision to this Court.[4]

established by statute[8], like the ones involved in the instant case are not readily susceptible to equitable modification or tempering." *Helton v. Reed,* 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006) (internal citations and quotations omitted here but set forth in the corresponding footnote below)[9]

The *Reed* Court went on to explain that "[t]he second consideration is the application in the instant case of two classic (and closely related principles: the maxim "equity will not enforce a forfeiture" and the maxim "he who seeks equity must do equity." The Court goes on to explain that that "'[f]orfeiture' is defined by *Black's Law Dictionary*, Sixth Edition, as 'the loss of . . . property because of neglect of duty.' 'To forfeit is to incur loss through some fault, omission, error or offense'". *Helton v. Reed,* 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006). The *Reed* Court goes on to explain that with respect to this second equitable principle, "he who seeks equity must do equity." *Id.* (internal citations and quotations omitted).

Turning now to the case at hand, the Petitioner testified, in pertinent part and where applicable, presented exhibits that were introduced into testimony, indicating that: 1) The Assessment date was the first date that she had knowledge of the improperly issued Refund

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[8] Recognizing that *Reed* involved filing requirements for petitions for appeal or petitions for refund before the OTA, Petitioner was unquestionably subject to not only the filing requirements for personal income taxes imposed by Chapter 11 of West Virginia Code but likewise by the payment requirements of the Code. The evidence is uncontroverted that Petitioner did not timely pay the amount shown on her timely filed 2013 Return.

[9] *See, e.g.*, *Concept Mining, Inc. v. Helton*, 217 W.Va. 298, 617 S.E.2d 845 (2005) (Tax Commissioner's intent was irrelevant and procedural error prohibited consideration of Commissioner's appeal); *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 195 W.Va. 537, 466 S.E.2d 388 (1995) (strict deadlines in insurance insolvency cases); *Solution One Mortg., LLC v. Helton*, 216 W.Va. 740, 613 S.E.2d 601 (2005) (tax statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional). *See also Elk Run Coal Company v. Babbitt*, 930 F.Supp. 239 (S.D.W.Va.1996) (government could not appeal due to missed deadline); *Bradley v. Williams*, 195 W.Va. 180, 465 S.E.2d 180 (1995) (taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner precludes the taxpayer's claim for refund or credit); *Webb v. U.S.*, 66 F.3d 691 (4th Cir.1995) (no equitable tolling of tax filing deadlines); *see generally* Note, "The Problem of Equitable Tolling in Tax Refund Claims," 72 Notre Dame L.Rev. 545 (1995). *Helton v. Reed,* 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006).

Check; 2) Respondent should have known that the Refund Check should have been issued to Petitioner's spouse rather than Petitioner, inasmuch as Petitioner and her spouse have been married for over twenty (20) years and as, she argues, it is Respondent's responsibility to correctly identify taxpayers whether through GENTAX or any other internal database that Respondent uses to identify individual taxpayers and despite the fact that the Refund Check was not identified as such and as vendor code number listed on the Refund Check was that of Petitioner's rather than of her spouse although Petitioner did not necessarily know nor should she have necessarily had reason to know or to inquire about the vendor code; 3) Petitioner was confused given the proximity in dates between the Return Change and the Refund Check but where Petitioner assumed that Respondent just made a mistake which Petitioner alleges have been made by Respondent and the Internal Revenue Service in the past although there is no evidence to support this assertion other than Petitioner's own testimony; and 4) Respondent's actions have inconvenienced Petitioner, inasmuch as she is in the process of applying for a federal job and states that she had to disclose the Assessment (the foregoing shall be referred to collectively herein as ("the Petitioner's Position").

This Tribunal is mindful that it has previously held that "because this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to sit essentially as a court of 'equity'; we must apply the law as written and may not deviate from that obligation under any circumstance." West Virginia Office of Tax Appeals, Santized Decision, Docket Nos. 06-020 MFE, 06-021 MFE, 06-022 MFE, 06-023 MFE, 06-042 MFE, 06-038 MFE, 06-019 MFE & 06-129 MFE (April 24, 2006) (hereinafter known as the "OTA Decisions"). The governing law at issue in the OTA Decisions is applicable to the civil penalty for motor fuel and includes

nondiscretionary language with regard to application of the penalty. *See* W. Va. Code Section 11-14C-1, *et. seq*.

While the OTA Decisions are certainly of precedential value to this Tribunal, the governing law at issue there involves the motor fuel tax statute which includes mandatory language for a court to follow and that is clearly distinguishable from the governing law in this matter. Further, "this [Tribunal] s more concerned with the persuasiveness of precedent than with the weight of precedent." *Belcher v. Goins*, 184 W. Va. 395, 402, 400 S.E.2d 830 (1990). As the West Virginia Supreme Court of Appeals observed, "we are not bound by the mere weight of judicial precedent but rather by the rule which embodies the more persuasive reasoning. *Id.(quoting Hibpshman v. Prudhoe Bay Supply, Inc.,* 734 P.2d 991, 994 n. 8 (Alaska 1987)) and also *See also Berger v. Weber,* 82 Mich.App. 199, 208, 267 N.W.2d 124, 128 (1978) ("when the crowd is marching in the wrong direction it is time to break ranks and strike out on our own"). This Tribunal concludes that when not prohibited specifically by the West Virginia Code or any other law for which the OTA is duty bound to follow, it is within this Tribunal's jurisdiction to consider equitable arguments made by the parties before it.

Having now determined that this Tribunal has the *power* to consider the equitable type arguments made in Petitioner's Position and applying the applicable statutory and case law to the matter at hand, this Tribunal is unconvinced that the Assessment against Petitioner should be vacated for the reasons set forth herein. In *Reed,* the taxpayer sought to assert the equitable factors of the "understanding" and "intent" of the parties, and the "estoppel" effect of the Commissioner's conduct- in order to claim the benefit of and enforce a forefeiture by the Commissioner." Likewise, the Petitioner here seeks to use her interpretation of the events

leading up to the Assessment as well as her intent, for which there is evidence in the record that she manifested this intent, to address the issues in the Return Change letter by contacting Respondent's representatives.

Similar to the taxpayer in *Reed*, Petitioner here "wants to assert equitable factors- the "understanding" and "intent" of the parties, and the "estoppel" effect of the Commissioner's conduct-in order to claim the benefit of and enforce a forfeiture by the Commissioner." *Helton v. Reed*, 638 S.E.2d 160, 165, 219 W. Va. 561, 562 (2006). Recognizing that *Reed* involved filing requirements for petitions for appeal or petitions for refund before the OTA, Petitioner was unquestionably subject to not only the filing requirements for personal income taxes imposed by Chapter 11 of West Virginia Code but likewise by the payment requirements of the Code. The evidence is uncontroverted that Petitioner did not timely pay the amount shown on her timely filed 2013 Return.

This Tribunal is mindful of the *Reed* Court's recitation of the maxim "he who seeks equity must do equity." *Helton v. Reed*, 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006) (internal citations and quotations omitted). As the Court elaborated, the Court observed that in *Malcolm v. Talley*, 89 W.Va. 531, 536, 109 S.E. 613, 615 (1921), citing this maxim, it quoted as follows:

> "If, for example, a Plaintiff seeks an account against the Defendant, the Court will require the Plaintiff to do equity by *submitting himself to account in the same matter in which he asks an account; ...*" *Id*

In the matter at hand, Petitioner's Position cannot be sustained by this Court for equitable reasons given all of the evidence in this matter and in view of the applicable statutory and case laws. Petitioner admitted that she did not timely pay the amount due on the 2013 Return. Furthermore, she testified that she suspected and then confirmed that the Refund Check was

issued in error yet she nevertheless cashed the check and availed herself of the benefits from those funds. As the West Virginia Supreme Court of Appeals noted, the Latin formulation of this principle is "*qui sentit commodum sentire debet et onus,*" or "he who receives the advantage ought also to suffer the burden." *Helton v. Reed,* 638 S.E.2d 160, 219 W. Va. 557 (2006). Tribunal is simply unwilling and without authority to vacate the assessment due to Respondent's error by improperly issuing the Refund Check to Petitioner's spouse, particularly where, as here, she knew that she was not entitled to those funds yet used them for her own and/or her family's benefit.[10]

That Petitioner may have equitable arguments does not absolve them of the responsibility to follow the West Virginia Tax Code as written, including any legislative rules and other authoritative guidance.[11]

Finally, this Tribunal must view all of the evidence presented in this matter in light of the well settled principle that the taxpayer has the burden of proof. *See* W. Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W. Va.154, 544 S.E.2d 79 (2001). Based upon review of the entire record of these proceedings, the Petitioner here has failed to meet her

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[10] This Tribunal finds that, in this circumstance, Respondent's actions constitute harmless error, which the OTA's procedural rules address as follows: "No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order, or in anything done or omitted by the office of tax appeals, or by any of the parties, is grounds for granting a new evidentiary hearing or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the office of tax appeals to be inconsistent with substantial justice. The office of tax appeals, at every stage of a case, will disregard any error or defect that does not affect the substantial rights of the parties." W. Va. Code St. R. § 121-1-76

[11] This Tribunal finds no merit in Petitioner's assertion that the Return Change Letter and other procedures of Respondent were unfair given that the governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's accounts or returns. W. Va. Code §11-10-7; W. Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59.

statutorily imposed burden of proof. Accordingly, this Tribunal may not grant Petitioner her requested relief.

CONCLUSIONS OF LAW

1. In a hearing before this Tribunal, it is well settled that the taxpayer has the burden of proof. *See* W. Va. Code §11-10A-10(e); *RGIS Inventory Specialists v. Palmer*, 209 W. Va.154, 544 S.E.2d 79 (2001).

2. This Tribunal finds that the governing statute and legislative rules clearly grant the Respondent the power to investigate and to make changes to an individual's accounts or returns as well as to make appropriate assessments for non-payment of taxes when necessary. *See* W. Va. Code §11-10-7; W. Va. Code §11-21-12 *et seq*; 110 Code of State Regulations 21, §59.

3. As set forth by the West Virginia Supreme Court of Appeals, "the filing requirements established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering." *Helton v. Reed,* 638 S.E.2d 160, 164; 219 W. Va. 557, 561 (2006).

DISPOSITION

Based upon the applicable case and statutory law and review of the entire record in this matter, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that Assessment issued against Petitioner should be and hereby is **AFFIRMED**.

Interest continues to accrue on the unpaid taxes until these liabilities are fully paid pursuant to West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Heather G. Harlan
Chief Administrative Law Judge

_____
Date Entered